No. 02-983

MAY 2 2003

In the

Supreme Court of the United States

FRANK CASS,
Petitioner,

v.

PATRICIA LOVE STEPHENS,
INDIVIDUALLY AND AS TRUSTEE OF
THE WALTER H. STEPHENS TRUST,
THE SSH TRUST, THE SUTTON
ELIZABETH STEPHENS IRREVOCABLE TRUST,
and THE HEATHER LOVE STEPHENS
IRREVOCABLE TRUST,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
TEXAS SUPREME COURT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This reply is necessary to address new issues raised by this Court's decision in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), as well as new issues raised by the Respondents in their Brief in Opposition to Petition for Writ of Certiorari. In his Petition, Petitioner Frank Cass ("Cass") asked this Court to grant the Petition so that the Court could provide additional guidance to lower courts reviewing punitive damages awards under the Due Process Clause. This Court recently provided that guidance in *Campbell*. Contrary to Respondents' assertions, the *Campbell* decision demonstrates that the Texas Court of Appeals did not correctly analyze whether the punitive damages award violated Cass's due process rights.

In *Campbell,* this Court made it clear that in most cases, where the ratio between punitive damages and actual damages exceeds a single digit, the requirements of due process will not be satisfied. Here, as the Texas Court of Appeals acknowledged, the ratio between punitive damages and actual damages was 25 to 1. In the *Campbell* decision, this Court also clarified its earlier rulings and determined that a punitive damages award must be reviewed *de novo* by an appellate court. The Texas Court of Appeals gave deference to the trial court's award and did not state that it was applying a *de novo* standard of review. Under *Campbell,* a court may not consider the defendant's financial condition when testing the constitutionality of an award. As Respondents point out, however, the Texas Court of Appeals did consider Cass's financial condition in analyzing whether the punitive damages award was excessive.

Since *Campbell*, this Court has granted five petitions for certiorari and remanded those cases for reconsideration of the punitive damages awards. Given the 25 to 1 ratio of punitive to actual damages, the Texas Court of Appeals' failure to clearly apply a *de novo* standard of review, and the effect of Cass's alleged wealth on the analysis of the award, this Court should similarly grant the Petition, vacate the judgment, and remand this case to the Texas Court of Appeals.

Respondents are also incorrect in asserting that Cass's arguments regarding the Texas no-publication and no-citation rules are not justiciable. The adoption of new rules of procedure by the Texas Supreme Court does not affect Cass's ability to raise the issue. Because Cass personally has been adversely affected by the rules and he asked the Texas Court of Appeals to publish its decision, there is no question that he has standing to raise the constitutionality of the no-publication and no-citation rules.

POINT I THE PETITION SHOULD BE GRANTED, THE JUDGMENT VACATED, AND THE CASE REMANDED TO THE TEXAS COURT OF APPEALS FOR FURTHER CONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *STATE FARM V. CAMPBELL* BECAUSE THE RATIO BETWEEN PUNITIVE DAMAGES AND ACTUAL DAMAGES IS 25 TO 1, AND THE TEXAS COURT OF APPEALS DID NOT APPLY ALL THE PRINCIPLES ESTABLISHED IN *CAMPBELL*.

Contrary to Respondents' assertion, the Texas Court of Appeals' decision cannot be reconciled with this Court's recent decision in *Campbell*. While the Texas Court of Appeals approved a 25 to 1 ratio of punitive to actual damages, saying the ratio was not shocking, in *Campbell*,

this Court stated that any ratio exceeding a single digit is suspect. This Court has recently remanded a number of cases for reconsideration in light of *Campbell*, including four cases where the ratio was less than the 25 to 1 ratio here. The Texas Court of Appeals also failed to clearly apply a *de novo* standard as articulated in *Campbell* and took Cass's financial condition into consideration in analyzing whether the punitive damages award was excessive. The jury's consideration of Cass's alleged litigation-related misconduct should also be reviewed in light of the prohibition in *Campbell* against taking into account dissimilar acts.

A. The Texas Court of Appeals Approved a Punitive Damages Award That is 25 Times the Actual Tort Damages Awarded, and This Court, in *Campbell*, Made it Clear That Where the Ratio Exceeds a Single Digit, Due Process Concerns are Rarely Satisfied.

The Petition should be granted because, in the wake of *Campbell*, the Texas Court of Appeals' approval of a 25 to 1 ratio of punitive to actual damages does not satisfy the requirements of the Due Process Clause. The jury awarded approximately $200,000 in actual tort damages against Cass and, after remittutur, the punitive damages award was $5 million. (App. A55-56.) As the Texas Court of Appeals stated, the ratio of punitive to actual damages, after remittitur, is approximately 25 to 1.[1] (App. A55.) In

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[1]Respondents attempt to mislead this Court by asserting that the ratio of punitive damages to actual damages is 6 to 1. (Opposition at 20.) This calculation includes actual damages for breach of contract, a cause of action for which punitive damages are unavailable in Texas. *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981). Under Texas law, for a party to recover punitive damages, there must

reviewing the judgment, the Texas Court of Appeals referenced the three "guideposts" established in *BMW of North America v. Gore*, 517 U.S. 559 (1996). With respect to the second guidepost, the disparity between actual and punitive damages, the Texas Court of Appeals applied what it called an "eyebrow test" to the punitive damages and stated that the court "was not shocked by" the 25 to 1 ratio. (App. A60.) The test used by the Texas Court of Appeals is not acceptable in the wake of *Campbell*.

In *Campbell*, this Court noted that when the ratio between punitive and actual damages exceeds a single digit, the punitive damages award is definitely suspect. Acknowledging that there is no particular bright-line test for determining whether a ratio is or is not acceptable, this Court stated that "our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 123 S. Ct. 1513. The 25 to 1 ratio in this case is clearly questionable under *Campbell*.

Respondents assert that the punitive damages award is entirely justified by Cass's alleged egregious conduct and claim, as the Texas Court of Appeals did, that the ratio is appropriate based on such conduct. (Opposition at 20-21; App. A60.) In *Campbell*, this Court noted that ratios exceeding single digits might comport with due process where "a particularly egregious act has resulted in only a

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be a finding of an independent tort with accompanying actual damages. *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995). The Texas Court of Appeals acknowledged that the relevant ratio was 25 to 1 based on the actual tort damages awarded. (App. A55.)

small amount of economic damage." *Id., quoting Gore,* 517 U.S. at 582. If, however, "compensatory damages are substantial," due process may only be satisfied by a lesser ratio, "perhaps only equal to compensatory damages." *Id.* Here, Respondents were awarded more than $200,000 in actual tort damages. (App. A55-56.) In such a situation, "it should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Campbell*, 123 S. Ct. 1513, *citing Gore*, 517 U.S. at 575. When relying on Cass's alleged egregious conduct, the Texas Court of Appeals did not take into account the large amount of actual damages awarded or whether Cass's conduct is "so reprehensible" that it justified a departure from the norm.

B. This Court has Recently Remanded a Number of Similar Cases for Reconsideration in Light of *Campbell.*

As of the time this Reply was prepared, since issuing the *Campbell* decision, this Court has issued five orders granting petitions for certiorari, vacating the judgments, and remanding to the lower court for further consideration in light of *Campbell. See DeKalb Genetics Corp. v. Bayer Cropscience, S.A.*, 2003 WL 1903721 (U.S. April 21, 2003) (3 and 1/3 to 1 ratio of punitive damages to actual damages[2]); *Key Pharmaceuticals, Inc. v. Edwards*, 2003 WL 1903722 (U.S. April 21, 2003) (7 to 1 and 11 to 1 ratio of punitive

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[2] *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1347 (Fed Cir. 2002).

damages awards to actual damages awards[3]); *National Union Fire Ins. Co. v. Textron Financial Corp.*, 2003 WL 1903724 (U.S. April 21, 2003) (10 to 1 ratio of punitive damages to actual damages[4]); *Anchor Hocking, Inc. v. Waddill*, 2003 WL 1903723 (U.S. April 21, 2003) (10 to 1 ratio of punitive damages to actual damages[5]); *San Paolo U.S. Holding Co., Inc. v. Simon*, 2003 WL 1903720 (U.S. April 21, 2003) (340 to 1 ratio of punitive damages to actual damages[6]). In only one of the cases where this Court granted certiorari since *Campbell* did the punitive-to-actual damages ratio exceed the 25 to 1 ratio in this case. Given that a 25 to 1 ratio is necessarily suspect in the wake of *Campbell*, this Court should similarly grant the Petition in this case, vacate the judgment, and remand the case for consideration in light of *Campbell*.

C. The Petition Should be Granted Because the Texas Court of Appeals did not Conduct a *De Novo* Review of the Punitive Damages Award.

The Petition should also be granted because the Texas Court of Appeals gave excessive deference to the trial court's determination and did not clearly apply the *de novo* standard to its review of the punitive damages award. The Texas Court of Appeals stated that for an award to violate the due process clause, it "must be so unreasonable and

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[3] *Bocci v. Key Pharmaceuticals, Inc.*, 35 P.3d 1106, 1107 (Or. App. 2001).

[4] *Textron Financial Corp. v. National Union Fire Ins. Co.*, 2002 WL 1399105, *1 (Cal. App. 2002).

[5] *Waddill v. Anchor Hocking, Inc.*, 27 P.3d 1092 (Ore. App. 2001).

[6] *Simon v. San Paolo U.S. Holding Co., Inc.*, 2001 WL 1380836, *1 (Cal. App. 2001).

disproportionate that an appellate court can justly disregard the jury's verdict and conclude that the award is grossly excessive." (App. A59.) This analysis is not consistent with this Court's directive in *Campbell* and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), that appellate courts must conduct a *de novo* review of the trial court's application of the *Gore* standards to ensure that a punitive damages award "is based upon 'an application of law, rather than a decisionmaker's caprice'." *Campbell*, 123 S. Ct. 1513, *quoting Cooper Indus.*, 532 U.S. at 436. The Petition should be granted so that the proper standard of review may be applied.

D. The Petition Should be Granted Because the Texas Court of Appeals Impermissibly Considered Cass's Financial Condition in Reviewing the Punitive Damages Award.

The Texas Court of Appeals also improperly considered Cass's financial condition in addressing whether the punitive damages award was excessive. Respondents assert that the punitive damages awarded against Cass were justified by his financial condition and, in particular, by proceeds Cass "presumably" received from the sale of other oil wells. (Opposition at 20 and n. 22.)[7] The Texas Court of Appeals, in analyzing the claim that the punitive damages were excessive, specifically referenced Cass's financial condition. (App. A57.) No authority is cited for the proposition that such information, or any other information about Cass's financial condition, has any relevance when

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[7]Respondents' claim that Cass sold the wells in question for $12 million is completely unsupported by any competent evidence in the record. The only competent evidence at trial showed that the sale resulted in little or no net proceeds to Cass.

determining whether a punitive damages award violates the due process clause. Indeed, this Court has recently made it plain that "the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 123 S. Ct. 1513, *citing Gore*, 517 U.S. at 585. Respondents' continuing reliance on Cass's financial condition, and the Texas Court of Appeals' references to that information, support granting the Petition, vacating the judgment, and remanding the case.

E. The Petition Should be Granted to Address Whether, After *Campbell*, a Jury May Consider Alleged Misconduct by a Defendant Unrelated to the Subject Matter of the Plaintiff's Claims in Assessing Damages.

The Petition should also be granted to address what misconduct a jury may consider in making its award of punitive damages. It appears from the record that the jury was heavily influenced by the $978,492.10 in sanctions imposed by the trial court against Cass for alleged misconduct during the litigation. (App. A11.) This sanctions award was based on a finding that Cass committed discovery abuse by throwing away relevant documents after the filing of the lawsuit. (App. A11.) Respondents do not dispute the fact that the jury was made aware of this alleged misconduct, but claims that no dissimilar conduct was considered by the jury. (Opposition at 22.) This Court has established that "a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Campbell*, 123 S. Ct. 1513. In *Campbell*, the Court held that the Utah Supreme Court's reliance on hypothetical claims by other parties was improper. Here, to the extent that the jury based its punitive damages award on other conduct by Cass, such as

the alleged post-litigation destruction of documents, that is also conduct independent from the acts on which liability was premised and cannot be a basis for the punitive damages award.

POINT II THE PETITION SHOULD BE GRANTED BECAUSE CASS HAS STANDING TO RAISE THE JUSTICIABLE ISSUE OF WHETHER RULES PROHIBITING CITATION OF APPELLATE OPINIONS VIOLATE THE CONSTITUTIONAL RIGHTS OF LITIGANTS.

The Court should also grant the Petition to address the constitutional issues raised by the Texas no-publication rules. Respondents do not address the merits of Cass's claim or the importance of this issue. *See, e.g. Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.2d 1054 (8th Cir. 2000) (en banc). Instead, Respondents wrongly assert that the issue is not justiciable and that Cass cannot raise it.

Cass did raise the issue in a timely fashion. Respondents claim that the publication issue could only be raised if Cass asked that the opinion be published, asserting that Cass never did so. (Opposition at 23.) Cass asked the Texas Court of Appeals to publish the decision in his Motion for Rehearing, which was denied. (Reply App. RA 1-2.) The issue has therefore been preserved for review.

The issue has not been rendered moot by the January 2003 amendments to the Texas Rules of Appellate Procedure. Tex. R. App. P. 47.7 (effective January 1, 2003). Cass's interests, and his ability to seek review, were affected by the rules then in effect, and that impact was not cured by the amendment to the rules.

Cass also has standing to raise the issue. Respondents claim that Cass has no personal stake or real interest in the outcome and is not the proper person to raise the issue. (Opposition at 25.) No authority is cited for the proposition that Cass could only raise the no-citation issue if he was prevented from citing a helpful case by the rules. In reality, Cass has been adversely affected by the because the no-publication rules allowed the Texas Court of Appeals to disregard its own precedents without fear that its opinion would have any likelihood of being reviewed by the Texas Supreme Court. An unpublished decisions could not be important to the state's jurisprudence, thereby precluding review under Texas law. Tex. Gov't Code § 22.001(a). Because no-citation rules prohibited Cass from invoking prior unpublished decisions and adversely affected his access to further appellate review, the Court should grant the Petition and determine whether such rules violate litigants' due-process rights.

CONCLUSION

Petitioner asks this Court to Grant the Petition, vacate the judgment, and remand the case to the Texas Court of Appeals.

Respectfully submitted,

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. . EXCERPT FROM MOTION FOR REHEARING FILED FEBRUARY 9, 2001 IN CASS v. STEPHENS, No. 08-97-00582-CV, IN THE COURT OF APPEALS OF TEXAS, EL PASO

. . .

Whether or not the Court grants rehearing, Frank Cass requests that, pursuant to Texas Rule of Appellate Procedure 47.3(c), the Court order its opinion to be published. Texas Rule of Appellate Procedure 47.4 provides that an opinion should be published, if, inter alia, it establishes or modifies a rule of law, or involves a legal issue of continuing public interest. In its opinion, the Court:

- Changed the law of alter ego by expanding the definition of personal benefit to include the inference of benefits to family and/or friends

- Created a new standard for applying the discovery rule and the fraudulent concealment doctrine, whereby a court may later determine that a plaintiff need not exercise due diligence to uncover causes of action if, based on subsequent conduct and without any contemporaneous evidence, a jury could infer such actions would have been futile.

- Applied the discovery rule to conversion claims discovered with a simple audit.

- For the first time allowed a JOA operator to be held liable in tort for operations

- Allowed areas of double recovery, including damages based on expert testimony beyond the expert's admitted field of expertise.

The Court's opinion constitutes a significant contribution to Texas jurisprudence, particularly in the field of oil and gas law. In addition, failure to publish the opinion arguably deprives Frank Cass of his due process and equal protection rights. The Court's unpublished decision means, in essence, that Frank Cass was held liable for a multitude of damages for which no operator has ever been liable or will ever again be liable.

CONCLUSION AND PRAYER

For the foregoing reasons, Frank Cass respectfully asks this Court to grant the motion for rehearing, withdraw its opinion, reverse and remand for a new trial, or in the alternative order that the Court's opinion be published, and grant Frank Cass such other and further relief to which he may be justly entitled.

RESPECTFULLY SUBMITTED,

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